

1 November 2000

TO: Jeffrey M. Senger, Deputy Senior Counsel
for Dispute Resolution, DOJ

FROM: Martin J. Harty

SUBJECT: Draft Report of the Federal ADR Council on Confidentiality in Federal
Alternative Dispute Resolution Programs

The comments on the draft report reflect my personal views only and are from the perspective of a mediator of Government contract matters.

I suggest that the proposed model confidentiality statement be reconsidered in favor of more detailed question and answer coverage on the limits of confidentiality. I would leave the scope of the confidentiality required in a particular case to the parties, aided by the neutral to the extent requested. Alternatively, I would focus the statement only on the possibility that a court could trump the ADRA confidentiality provisions.

As it stands, the model statement raises more questions about the limits of confidentiality than it answers and the cautionary tone of the statement could have a serious negative impact on the mediation process. Many things that go without saying ought to be said from time to time, but this is not one of those times. First, what violations of criminal law or threats of physical harm are we talking about in a

Government contract mediation that warrant mention by a neutral? Second, mediation in Government contract cases comes to a halt if fraud is involved. The parties understand this from the inception. See FAR 33.209 and FAR 33.210. Finally, in the context of a Government contract mediation, am having trouble understanding what would constitute an act of “waste and abuse.” Is an improvident settlement an act of waste or abuse? Without an understanding of what is intended, mentioning of the issue seems pointless and counterproductive to me.

The reference to an act of fraud, waste or abuse summons up the legitimate oversight role of the various inspectors general. Again, it seems that the potential role of an inspector general in reviewing any settlement is something that must be addressed between the parties, particularly the Government. It is the responsibility of the parties to justify the settlement of a particular matter, not the neutral. In any case, it seems to me that the potential involvement of an inspector general in reviewing a settlement requires further analysis insofar as the limits of ADRA confidentiality are concerned. I recommend that the Council consider whether further analysis is in order in an effort to ease the “tension” between ADRA confidentiality and the disclosure authority of the various federal entities by providing more definitive guidance..

Thank you for the opportunity to comment.